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Legal Statements and Normative Language

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Abstract

Can there be a non-reductivist, source-based explanation of the use of normative language in statements describing the law and legal situations? This problem was formulated by Joseph Raz, who also claimed to have solved it. According to his well-known doctrine of 'detached' statements, normative legal statements can be informatively made by speakers who merely adopt, without necessarily sharing, the point of view of someone who accepts that legal norms are justified and ought to be followed. In this paper I defend two theses. I argue, first, that the notion of a detached statement cannot be made to work, and that Raz's problem is thus not thereby solved. But the problem itself, I also suggest, is a false one.

Keywords

legal 'ought'; detached statements; normative language; legal positivism

Legal Statements and Normative Language

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ABSTRACT. Can there be a non-reductivist, source-based explanation of the use of normative language in statements describing the law and legal situations? This problem was formulated by Joseph Raz, who also claimed to have solved it. According to his well-known doctrine of 'detached' statements, normative legal statements can be informatively made by speakers who merely adopt, without necessarily sharing, the point of view of someone who accepts that legal norms are justified and ought to be followed. In this paper I defend two theses. I argue, first, that the notion of a detached statement cannot be made to work, and that Raz's problem is thus not thereby solved. But the problem itself, I also suggest, is a false one.

I discuss in this paper what Joseph Raz called 'the problem of explaining the use of normative language in describing the law or legal situations.'¹ The paper has four sections. The 'problem' is reconstructed and presented in section I. It is a problem for legal positivism: can there be a non-reductivist, source-based explanation of the use of normative language in legal statements? Raz's proposed solution is summarized in section II. This solution relies on the identification of a kind of normative statement of law which, made from the 'point of view' of someone who accepts legal norms as (morally) justified, does not express the speaker's acceptance of that point of view. Raz terms such statements 'detached legal statements.' These two first sections are reconstructive, but also partly exegetical: a necessary exercise if both problem and solution are to be attended to with sufficient precision. Discussion proper is undertaken in sections III and IV. In section III I criticize Raz's solution and the doctrine of detached statements. And in section IV I argue that the 'problem' itself is false. Why do I bother to discuss a candidate solution to a problem that I deem to be false? For three main reasons. First, sections III and IV are relatively independent; should you disagree with the latter and believe that the problem is not a false one, I still wish to maintain that Raz's proposed solution to it is inadequate. Second, the presentation of my argument against the doctrine of detached statements will help me bring out more clearly why I believe the underlying problem to be false. Lastly, the content of Raz's solution has been accepted and incorporated in contemporary jurisprudence without much questioning—and indeed often treated as the product of a discovery—even though the problem itself, not exactly a favourite or pressing topic of today, has become somewhat out of sight.

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¹ *Practical Reason and Norms* (first published 1975, OUP 1990) 170.

I. THE PROBLEM

It is a fact that ‘people use normative language in describing the law,’ as Joseph Raz puts it.² The law ‘is described and analysed in terms of duties, obligations, rights and wrongs, etc’ — the ‘very same terminology which is used in moral discourse.’³ And this fact, Raz submits, is philosophically salient. We need an ‘explanation of the use of normative terms to describe the law and legal situations,’⁴ even more so if we observe that an ‘alternative,’ ‘non-normative’ vocabulary is also available, and also put into service:

[O]ne has an alternative vocabulary for describing the law which is not infrequently used. One can talk of that which one is required by law to do, of what one had better do to avoid prison, of what the ruling class, the power élite, the tyrant, etc, dictate or demand. These and many other expressions provide a rich non-normative vocabulary for describing legal situations which is more often used than some legal scholars would like to admit.⁵

What we need to explain, then, is ‘why people use normative language in describing the law.’⁶ This question is not only deemed puzzling — it constitutes, in Raz’s opinion, ‘one of the main stumbling blocks for legal positivists’.⁷ How so? Drawing from several of his writings on the topic,⁸ here is an informal reconstruction of Raz’s argument. Consider the following ‘semantic thesis’:⁹

(T1) ‘[T]erms like “rights” and “duties” cannot be used in the same meaning in legal and moral contexts.’¹⁰

This thesis, Raz says — writing in 1979, which should be kept in mind — ‘can be identified as common to most positivist theories.’¹¹ Why would a legal positivist defend

² ‘Postscript’ to *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 235.

³ ‘Preface to the First Edition’ (1979) in *The Authority of Law* (2nd edn, OUP 2009) xi.

⁴ *Practical Reason and Norms* (above n. 1) 169.

⁵ ‘Postscript’, *The Concept of a Legal System* (above n. 2) 235.

⁶ *Ibid.*

⁷ ‘Preface to the First Edition’, *The Authority of Law* (above n. 3) xi.

⁸ In chronological order of first publication: ‘On Lawful Governments’ (1970) 80 *Ethics* 296-305; ‘Kelsen’s Theory of the Basic Norm’ (1974) in *The Authority of Law* (above n. 3) 122-45; *Practical Reason and Norms* (above n. 1); ‘Kelsen’s General Theory of Norms’ (1976) 6 *Philosophia* 495-504; ‘Legal Validity’ (1977) in *The Authority of Law* (above n. 3) 146-59; ‘Promises and Obligations’ in P.S.M. Hacker and J. Raz (eds), *Law, Morality, and Society. Essays in Honour of H.L.A. Hart* (Clarendon Press 1977) 210-28; ‘Preface to the First Edition’ (1979) (above n. 3) ix-xiii; ‘Legal Positivism and the Sources of Law’ (1979) in *The Authority of Law* (above n. 3) 37-52; ‘Legal Reasons, Sources, and Gaps’ (1979) in *The Authority of Law* (above n. 3) 53-77; ‘Postscript’ (1980) (above n. 2) 209-238; ‘The Purity of the Pure Theory’ (1981) in *The Authority of Law* (above n. 3) 293-312; ‘Legal Rights’ (1984) in *Ethics in the Public Domain. Essays in the Morality of Law and Politics* (Clarendon Press 1994) 238-60; ‘On the Nature of Law’ (1996) in *Between Authority and Interpretation* (OUP 2009) 91-125.

⁹ ‘Legal Positivism and the Sources of Law’ (above n. 8) 38.

¹⁰ *Ibid.*

¹¹ *Ibid.*

(T1)? A positivist necessarily holds the so-called ‘sources thesis,’¹² which may be formulated as

(T2) ‘[T]he identification of the law and of the duties and rights it gives rise to is a matter of social fact. The question of its value is a further and separate question.’¹³

A legal positivist holds, in other words, that ‘the content and existence of the law can be determined by reference to social facts and without relying on moral considerations.’¹⁴ And from the conjunction of (T2) and the fact, above mentioned, that ‘terms like “rights” and “duties” are used to describe the law — any law regardless of its moral merit,’¹⁵ the semantic thesis (T1), Raz says, ‘seems to follow’; for ‘if such terms are used to claim the existence of legal rights and duties which may and sometimes do contradict moral rights and duties, these terms cannot be used in the same meaning in both contexts.’¹⁶

The same point can be made in a different manner. Consider a distinct ‘semantic thesis’:

(T3) ‘[N]ormative terms like “a right”, “a duty”, “ought” are used in the same sense in legal, moral, and other normative statements.’¹⁷

Clearly inconsistent with (T1), this thesis — which, Raz observes, is ‘generally endorsed by natural lawyers’ — appears to imply both (T4) and (T5),

(T4) ‘Legal statements are normative statements in the same sense and in the same way that moral statements are normative.’¹⁸

(T5) Legal statements are ‘full-blooded normative statements’,¹⁹ statements ‘about what ought to be done, what rights and duties people have because of the law’;²⁰ they express the speaker’s acceptance of the ‘validity’ of the law — the acceptance that the law ‘is justified’ and ‘ought to be followed,’²¹

from which it seemingly follows that

(T6) Legal statements are ‘ordinary moral statements’;²² ‘For example, when one states “It is John’s legal duty to repay the debt” one is asserting that John has a (moral) duty to

¹² ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

¹³ ‘Legal Validity’ (above n. 8) 158.

¹⁴ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

¹⁵ ‘Legal Positivism and the Sources of Law’ (above n. 8) 38.

¹⁶ *Ibid.*

¹⁷ ‘Legal Validity’ (above n. 8) 158.

¹⁸ ‘The Purity of the Pure Theory’ (above n. 8) 303.

¹⁹ *Ibid.* 305.

²⁰ *Ibid.* 306.

²¹ Cf. *Practical Reason and Norms* (above n. 1) 127-28.

²² Cf. ‘The Purity of the Pure Theory’ (above n. 8) 306.

repay the debt arising out of the law.’²³

But the positivist, in virtue of endorsing (T2), holds that ‘one may know what the law is without knowing if it is justified’;²⁴ the positivist, thus, necessarily rejects (T6). So if (T6) follows from (T3), then by *modus tollens* the positivist needs to reject (T3), thus endorsing (T1).

What, then, is the problem that the positivist must face? From Raz’s point of view, the problem is quite simply that (T3) is true. Raz declares himself convinced by Hart’s ‘most formidable criticism’ of ‘reductivist explanations of legal statements’²⁵ according to which ‘such statements are statements of [social] fact, not normative statements at all’²⁶ — and which was, Raz says, the stance adopted by ‘early positivists such as Bentham [or] Austin,’²⁷ who

claimed that legal statements are synonymous with statements about what certain people commanded or willed, or about the chances that a man may come to harm of a certain kind [...].²⁸

Now, Hart’s anti-‘reductivism’ was accompanied by his ‘expressive explanation’²⁹ of the ‘deontic’ or ‘practical’ character of legal statements as statements used, as Raz puts it, ‘to demand and justify action.’³⁰ But Raz, while siding with Hart in opposing ‘reductivist’ accounts of legal statements, does not wish to subscribe to Hart’s ‘account of the normative dimension in terms of the illocutionary and expressive force of legal statements.’³¹ Raz’s account of legal statements is given instead in terms of ‘reasons’: legal statements are always (or can always be ‘explained in terms of’) ‘statements of legal reasons for actions.’³² Statements of reasons for actions are said ‘logically’ to be the ‘most elementary stratum’ of ‘deontic statements generally,’ legal or otherwise,³³ and statements of the form ‘Legally x ought to ϕ ’ or ‘It is the law that x ought to ϕ ’ are thus deemed to ‘mean the same’ as statements of the form ‘there is a legal reason for x to ϕ .’³⁴ Statements of reasons for action cannot be ‘reduced’ to statements about social facts: ‘a statement of law, of what legal rights or duties people have’ is *not* a statement ‘about people’s beliefs, attitudes, or actions, not even about their beliefs, attitudes, or actions about the law.’³⁵ Hence, according to Raz, (T3) is true — which would appear to imply that (T2), the ‘sources thesis,’ is false. But at the same time Raz wishes, as do positivists more generally, to defend the ‘sources thesis’;

²³ ‘Legal Validity’ (above n. 8) 158.

²⁴ *Ibid.*

²⁵ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

²⁶ ‘Kelsen’s General Theory of Norms’ (above n. 8) 498.

²⁷ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

²⁸ *Ibid.*

²⁹ ‘The Purity of the Pure Theory’ (above n. 8) 301.

³⁰ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

³¹ ‘The Purity of the Pure Theory’ (above n. 8) 301.

³² ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 63.

³³ *Ibid.*

³⁴ *Ibid.* 65.

³⁵ ‘Legal Validity’ (above n. 8) 153.

and so the question becomes whether it is really the case that, if (T3) is true, legal positivism is wrong.

In order to render (T2) and (T3) compatible, and given that (T2) and (T6) are held by Raz to be clearly inconsistent, the positivist needs to be able to deny that (T6) follows from (T3). The positivist must be capable of defending the view that legal statements — statements, to stress the relevant point, in which normative language is employed in the same sense as in moral contexts: statements *of* reasons for action — are ‘grounded’ on the sources, i.e. on an ‘appropriate social fact specifiable without resort to moral argument,’ such as the fact that ‘last year Parliament decreed so.’³⁶ The positivist needs to be able to maintain that the existence of the relevant source is ‘the ground for the truth of statements of the form “legally *x* ought to ϕ ”.’³⁷

Legal positivism, in short, requires an ‘anti-reductivist explanation of legal statements, based on the sources thesis.’³⁸ Is it possible? *This* is the problem.

II. RAZ’S SOLUTION

The problem, Raz says, can be solved. The solution he offers is put forth as a ‘reconstruction,’³⁹ or ‘adaptation,’⁴⁰ of Hans Kelsen’s views. For Kelsen had, in Raz’s assessment, ‘the best positivist explanation of the use of normative language in law.’⁴¹ Differently from most positivists, Kelsen endorsed (T3): ‘adamant in rejecting all reductive analyses of legal statements,’⁴² ‘the gist of [his] semantic anti-reductivism’ lies in that for him ‘legal statements are normative statements in the same sense and in the same way that moral statements are normative.’⁴³ And yet Kelsen ‘developed a most ingenious way of combining the sources thesis with anti-reductivism.’⁴⁴ Hart’s ‘several attempts’ to solve the problem at hand, in turn, were ‘less successful,’⁴⁵ and it will prove instructive briefly to consider why exactly Raz thinks this was the case.

In Raz’s assessment,⁴⁶ Hart shared the view that admits of only two ‘basic types’ of normative statements:

- (a) Statements uttered ‘to assert what valid reasons for action there are,’ which express or imply the acceptance, on the part of the speaker, of the ‘validity’ of the law concerned (i.e., statements which express or imply a belief that such law is ‘justified’ and ‘ought

³⁶ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 65.

³⁷ *Ibid* 66.

³⁸ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 54.

³⁹ ‘The Purity of the Pure Theory’ (above n. 8) 306.

⁴⁰ ‘Legal Validity’ (above n. 8) 157.

⁴¹ ‘Preface to the First Edition’, *The Authority of Law* (above n. 3) xi.

⁴² ‘The Purity of the Pure Theory’ (above n. 8) 297.

⁴³ *Ibid* 303.

⁴⁴ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

⁴⁵ *Ibid*.

⁴⁶ Cf. *Practical Reason and Norms* (above n. 1) 211, endnote 3.

to be followed’);⁴⁷ and

(b) Statements ‘about people’s beliefs and attitudes to norms’.⁴⁸

In Hartian terminology, statements of the first type are said to be ‘internal’ — statements made from the ‘internal point of view’ — and those of the second type are called ‘external’.⁴⁹

Surely legal statements — statements *of* law — cannot, argues Raz, be ‘external’. External statements can be said to be ‘normative’ only in the sense that ‘normative language’ is used in them ‘to describe other people’s normative views’ — as in, in one of Raz’s examples, ‘During the last decade it has become common among professional people to believe that a woman has a right to abortion on demand.’⁵⁰ External statements are thus not ‘normative’ in the relevant sense: they are not statements of reasons for action. If the typology is to be exhaustive, legal statements must then belong to the first kind; they must be Hartian ‘internal’ statements. But these are statements of ‘what ought to be done,’ statements of ‘what rights and duties people have because of the law,’⁵¹ which imply the speaker’s acceptance that the law is ‘justified’ and ‘ought to be followed.’⁵² Internal statements are therefore ‘full-blooded,’ ‘ordinary moral statements.’⁵³ Hence (T6) is true — and the ‘sources thesis’ correspondingly false.

Of course, Hart would have resisted this conclusion, for he would have denied that a statement expressing that the speaker accepts that the law is justified and ought to be followed is properly characterized as an ‘ordinary moral statement.’⁵⁴ And Raz duly notes that Hart insisted that ‘moral reasons are only one type of reason for accepting rules and for having the kind of practical attitude manifested in [what Hart called] internal statements,’⁵⁵ and so that ‘ordinary legal discourse does not commit one to a moral approbation of the law’:⁵⁶

It is crucial to the understanding of Hart’s position to understand that his notion of acceptance or endorsement of a rule does not entail *moral* approval of it. A man may hold a rule to be morally justified

⁴⁷ Cf. *ibid* 127-28, 171-72, 177; and ‘Postscript’, *The Concept of a Legal System* (above n. 2) 235.

⁴⁸ Cf. *Practical Reason and Norms* (above n. 1) 172.

⁴⁹ Cf. ‘Legal Validity’ (above n. 8) 153ff; ‘The Purity of the Pure Theory’ (above n. 8) 307f. For Hart’s original account, see *The Concept of Law* (2nd edn, OUP 1994) 55ff, 82ff, 100ff, 137-38, 146-47, 155, 201ff, 217-18, 235, 254-55, and the endnotes at 289 and 291. For useful discussion of Hart’s distinctions, see the ‘Appendix’ to Neil MacCormick’s *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 275-92; his *H.L.A. Hart* (2nd edn, Stanford University Press 2008) 47ff; and Pedro Múrias, ‘Weber e Hart sobre as Perspectivas Externa e Interna: Uma Releitura’ in *Estudos em Homenagem ao Prof. Doutor Sérvulo Correia* (vol I, Coimbra Editora 2010) 105ff.

⁵⁰ Cf. ‘Postscript’, *The Concept of a Legal System* (above n. 2) 235-36.

⁵¹ ‘The Purity of the Pure Theory’ (above n. 8) 306-07.

⁵² *Practical Reason and Norms* (above n. 1) 127-28.

⁵³ ‘The Purity of the Pure Theory’ (above n. 8) 305-06.

⁵⁴ Cf., e.g., Hart’s ‘Legal and Moral Obligation,’ in A.I. Melden (ed) *Essays in Moral Philosophy* (University of Washington Press 1958) 92-93; or *The Concept of Law* (above n. 49) 203, 257.

⁵⁵ ‘The Purity of the Pure Theory’ (above n. 8) 307.

⁵⁶ *Ibid.*

and he may endorse it for this reason. But equally a man may endorse and follow a rule for any other reason, or for no reason at all.⁵⁷

This very point would moreover have enabled Hart to deny that (T6) follows from (T3), (T4) or (T5) — very easily solving the legal positivist's problem as formulated in the previous section. But Raz doesn't think that Hart's position can be consistently maintained. His objection relies mainly on the fact that 'much legal discourse concerns the rights and duties of others':

While one can accept the law as a guide for one's own behaviour for reasons of one's own self-preferences or self-interest one cannot adduce one's preferences or one's self-interest by themselves as a justification for holding that other people must, or have a duty to, act in a certain way. To claim that another has to act in my interest is normally to make a moral claim about his moral obligations.⁵⁸

And while '[t]here are to be sure reasons on which claims about other people's duties and rights can be based which are neither moral reasons nor the speaker's self-interest or preferences', says Raz, 'none of them nor any combination of them is likely to explain the widespread use of normative language in legal discourse.'⁵⁹ He thus finds it 'impossible to resist the conclusion that most [Hartian] internal [...] legal statements, at any rate those about the rights and duties of others, are moral claims.'⁶⁰ 'Most' internal statements, he concludes, *do* 'express moral endorsement of the law'.⁶¹ But it is surely false that most legal statements express the speaker's moral endorsement of the law: 'Clearly many legal statements do not express a moral position either way' — a fact, indeed, which 'need not be disputed by natural lawyers.'⁶² Therefore, 'not all statements are [Hartian] internal' statements.⁶³ But legal statements which are not 'internal' are also not, as we saw, 'external' statements. What then? 'Hart has no alternative account'⁶⁴ — precisely because he admits of only those two 'basic types' of statements, (a) and (b), identified above.

This is meant simultaneously to establish the intermediate conclusion that no 'anti-reductivist explanation of legal statements based on the sources thesis'⁶⁵ is possible if we acknowledge only those two types of statements, and to suggest the way out of the conundrum. The solution for the problem seems to require the possibility of a normative (and therefore not 'external') legal statement which, though 'made by the use of ordinary

⁵⁷ 'Legal Validity' (above n. 8) 154-55.

⁵⁸ 'The Purity of the Pure Theory' (above n. 8) 307; and cf. also Raz's distinction between someone 'who fully endorses a rule, i.e. believes that its subjects ought to follow it, and one who weakly accepts it, i.e. believes that he should follow it himself,' in 'Legal Validity' (above n. 8) 155, footnote 13.

⁵⁹ 'The Purity of the Pure Theory' (above n. 8) 307.

⁶⁰ *Ibid* 308. For Hart's own summary of this objection, which he found 'unrealistic,' and his reply to Raz, cf. 'Legal Duty and Obligation,' in his *Essays on Bentham. Jurisprudence and Political Theory* (Clarendon Press 1982) at 153-61. And cf. Raz's retort in 'Hart on Moral Rights' (1984) 4 *Oxford Journal of Legal Studies*, 129ff. Kevin Toh discusses Raz's argument at some length in 'Raz on Detachment, Acceptance, and Describability' (2007) 27 *Oxford Journal of Legal Studies*, 414-21. I am not concerned with this particular point in the present paper.

⁶¹ 'The Purity of the Pure Theory' (above n. 8) 308.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ *Ibid* 309.

⁶⁵ 'Legal Positivism and the Sources of Law' (above n. 8) 54.

normative terms, does *not* carry the same normative force of an ordinary legal statement.⁶⁶

Are such statements possible? Yes, says Raz, quite possible — and indeed quite frequent. This third species of legal statements, he says, was already, if unclearly, noticed by Kelsen in his doctrine of the '*Rechtssatz*.' Raz chooses to name them, as is well-known, 'detached legal statements', to contrast them with statements of type (*a*), which are dubbed 'committed.' ('Committed' legal statements, 'essentially the same as Hart's internal statements'⁶⁷, are thus 'ordinary moral statements about what ought to be done, what rights and duties people have because of the law').⁶⁸ And the 'doctrine of detached statements,' Raz says,

provides the framework for a solution to the dilemma by explaining a class of statements which are normally made by the use normative language, which are not about behaviour or beliefs but about rights and duties and which are none the less not committed and not internal statements.⁶⁹

Detached *legal* statements, in fact, are but a species of the more general class of detached normative statements. 'Detached statements,' says Raz, are 'widespread in legal contexts,' yes, but also 'widely used outside the law' 'in all spheres of practical reason, including morality.'⁷⁰ And they are, always according to Raz, 'of great importance to our understanding of discourse about the law as well as normative discourse in other contexts.'⁷¹ It may therefore be useful to examine the *general* notion before attending to the particularities of legal detached statements.⁷²

Generally speaking, a detached statement 'is to be found whenever a person advises or informs another of his normative situation in contexts which make it clear that the advice or information is given from a point of view or on the basis of certain assumptions which

⁶⁶ 'Legal Validity' (above n. 8) 156, my emphasis.

⁶⁷ 'The Purity of the Pure Theory' (above n. 8) 307.

⁶⁸ *Ibid* 306.

⁶⁹ *Ibid* 308.

⁷⁰ *Practical Reason and Norms* (above n. 1) 177.

⁷¹ *Ibid* 172.

⁷² I do not discuss in this paper how faithful to Kelsen's views Raz's 'reconstruction' actually is, although I find it quite unfaithful. The topic is debated. Hart, who had struggled with Kelsen's thoughts on normative statements in his essays 'Kelsen Visited' (1963) and 'Kelsen's Doctrine of the Unity of Law' (1968) — both included in his *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983), at 286ff and 309ff respectively — came to concur with Raz that 'it was this distinction [between committed and detached statements] which Kelsen in effect was making' (cf. the 'Introduction' to the same volume, 15). Michael Steven Green, e.g., seems to agree: cf. 'Kelsen, Quietism, and the Rule of Recognition,' in Matthew D. Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 370-371; on the topic, cf. also Julie Dickson, 'Interpreting Normativity' in Timothy Endicott, Joshua Getzler, and Edwin Peel (eds), *Properties of Law. Essays in Honour of Jim Harris* (OUP 2006) 21-42, esp. at 35-38. But see, for criticism, Eugenio Bulygin, 'Enunciados Jurídicos y Positivismo: Respuesta a Raz' (1981), in Carlos E. Alchourrón and Eugenio Bulygin, *Análisis Lógico y Derecho* (Centro de Estudios Constitucionales 1991) 427-38, esp. 433ff; Roberto J. Vernengo, 'Kelsen's *Rechtssätze* as Detached Statements,' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 99-108; James W. Harris, 'Kelsen, Revolutions, and Normativity,' in Elspeth Attwooll (ed), *Shaping Revolution* (Aberdeen University Press 1991) esp. 5-7, and 'Kelsen's Pallid Normativity' (1996) 9 *Ratio Juris*, 94-117, esp. 112ff; Uta C. Bindreiter, 'Presupposing the Basic Norm' (2001) 14 *Ratio Juris*, esp. 155-160; or Sylvie Delacroix, 'Hart's and Kelsen's Concepts of Normativity Contrasted' (2004) 17 *Ratio Juris*, 515-18; and see also Juan Carlos Bayón's apposite remark in *La Normatividad del Derecho: Deber Jurídico y Razones para la Acción* (Centro de Estudios Constitucionales 1991), footnote 28 at p. 28, and his general discussion at 27-36.

are not necessarily shared by the speaker.⁷³ Detached statements are normative statements made ‘from a certain point of view,’ ‘representing things as they seem to those who hold the point of view but indicating that it is not thereby endorsed.’⁷⁴ Consider two well-known examples of Raz’s:

Vegetarian example:

If I go with a vegetarian friend to a dinner party I may say to him, ‘You should not eat this dish. It contains meat.’ Not being a vegetarian I do not believe that the fact that the dish contains meat is a reason against eating it. I do not, therefore, believe that my friend has a reason to refrain from eating it, nor am I stating that he has. I am merely informing him what ought to be done from the point of view of a vegetarian. Of course the very same sentence can be used by a fellow vegetarian to state what ought to be done. But this is not what I am saying, as my friend who understands the situation will know.⁷⁵

Orthodox Jew example:

Imagine an orthodox but relatively ill-informed Jew who asks the advice of his friend who is Catholic but an expert in Rabbinical law. ‘What should I do?’ he asks, clearly meaning what should I do according to *my* religion, not yours. The friend tells him that he should do so and so. The point is that both know that this is not what the friend thinks that he really ought to do. The friend is simply stating how things are from the Jewish Orthodox point of view.⁷⁶

The distinctive features of detached statements may be aptly brought out if we pay attention to a syntactical ambiguity, in the vegetarian example, in the sentence ‘I am merely informing him what ought to be done from the point of view of a vegetarian.’ Two readings may be given of this sentence. On the first reading, the sentence denotes that ‘I’ made a statement informing the hearer of what ought to be done, and moreover mentions that that statement is made ‘from the point of view of a vegetarian.’ So ‘from the point of view of a vegetarian’ is predicated of the statement made. On the second possible reading, the sentence refers to a statement of — what ought to be done from the point of view of a vegetarian. Under this reading, the phrase ‘from the point of view of a vegetarian’ is *part of* the statement made, which therefore amounts to a conditional statement informing the hearer of what ought to be done if he, the hearer, accepts the point of view of a vegetarian.

Clearly the intended reading is the first one. Detached statements, Raz insists, are not to be understood as conditionals of the form ‘If you accept this point of view then you should [φ],’⁷⁷ but rather as statements made from a point of view ‘as if it is valid or on the hypothesis that is [valid]... but without actually endorsing it.’⁷⁸ Detached statements are like statements made ‘on the assumption that something is the case’ — for example, like statements made ‘on the assumption’ that ‘a certain scientific theory is valid,’⁷⁹ which are ‘not conditionals of which the assumption is the antecedent, nor do they presuppose that

⁷³ ‘Legal Validity’ (above n. 8) 156.

⁷⁴ ‘Promises and Obligations’ (above n. 8) 225.

⁷⁵ *Practical Reason and Norms* (above n. 1) 175-76.

⁷⁶ This example is given both in ‘Kelsen’s General Theory of Norms’ (above n. 8) 500, and in ‘Legal Validity’ (above n. 8) 156-57.

⁷⁷ Cf. ‘Kelsen’s General Theory of Norms’ (above n. 8) 500; *Practical Reason and Norms* (above n. 1) 175; ‘Legal Validity’ (above n. 8) 157; and ‘Postscript’, *The Concept of a Legal System* (above n. 2) 236-37, footnote 30.

⁷⁸ ‘Legal Validity’ (above n. 8) 157.

⁷⁹ *Practical Reason and Norms* (above n. 1) 175.

the theory is true,' but rather 'state what is the case from the point of view of the theory, or on the assumption of the theory.'⁸⁰

Some critics have denied that detached statements can really be distinguished from conditional statements of the form 'If you accept this point of view, then you should ϕ .'⁸¹ But the difference can perhaps be made clearer if we keep in mind that any detached statement may be either preceded or followed by the phrase 'speaking from the point of view of ...' without any change in meaning. This enables us to make salient the difference between, on the one hand, the conditional in

(1) If you accept the point of view of a vegetarian, you ought to ϕ ,

and, on the other hand, either of the following (which are equivalent):

(2a) You ought to ϕ — speaking from a vegetarian's point of view;

(2b) Speaking from a vegetarian's point of view, you ought to ϕ .

The adoption of a point of view, as in (2a) or (2b), ranges only, as it were, over the statement that 'you ought to ϕ ' — while the utterance of (1) can, in contrast, be made from no particular point of view.⁸²

This said, we may note that the vegetarian's and the non-vegetarian's statements may be linguistically identical. Both may utter a sentence of the form 'You ought to ϕ .' Raz clearly purports to indicate that their statements will somehow vary in *meaning*, broadly understood (to quote from the example itself, they will be 'saying' different things), although the very notion of a detached statement seems of course to imply that both speakers are in some sense 'saying' the *same* thing, albeit from different 'points of view.'⁸³

⁸⁰ *Ibid.*

⁸¹ Cf., most notably, Eugenio Bulygin, 'Enunciados Jurídicos y Positivismo: Respuesta a Raz' (above n. 72) 436-37. Philip Soper also finds it 'difficult to see how anything is lost if the [detached] statement is simply regarded as a hypothetical': cf. 'Legal Systems, Normative Systems, and the Paradoxes of Positivism' (1995) VIII *Canadian Journal of Law and Jurisprudence*, 372, footnote 16.

⁸² Raz also suggests a linguistic device for contrasting detached and committed statements: the former, but not the latter, are 'compatible with "but one has no reason whatsoever to ϕ "': cf. 'Postscript', *The Concept of a Legal System* (above n. 2) 236, footnote 30.

⁸³ This unhelpful ambiguity is often retained, if not enhanced, in the works of those who have adopted the notion. An example is John Finnis, who in *Natural Law and Natural Rights* (Clarendon Press 1980), at 233-237, takes up Raz's distinction between 'three types of statement' as a distinction between 'three senses' of 'normative statements,' even if 'in all these cases one and the same grammatical form may be used' (cf. *ibid* 234-35, and 365). Finnis, moreover, indistinctly uses his specially constructed notation to refer to *speakers* as well as *statements* (cf. *ibid* 234-35). But see on this point Cristina Redondo's discussion in *Reasons for Action and the Law* (Kluwer 1999) at 79ff. Redondo finds the 'detached'/'committed' distinction 'flawed' as a classification of statements rather than speakers: 'it projects a distinction on statements and propositions which is then justified entirely on a pragmatic level'; but 'statements and their meanings do not belong to the class of objects that can be qualified as "committed" and "detached". Rather than to statements, these qualities can only be applied to the agents uttering them': cf. *ibid* 81; and compare Matthew H. Kramer, *In Defense of Legal Positivism. Law Without Trimmings* (OUP 1999) 119. Nicola Muffato has recently endeavoured to inject some precision into these aspects of detached statements, in 'Resta Qualcosa da Dire Sulla Polivocità degli Enunciati Deontici?' (2009) 9 *Diritto e Questioni Pubbliche* 9, 589-623. For this he employs two distinctions: on the one hand, the well-known distinction between *using* and *mentioning* a given linguistic expression (*ibid* 597ff); on the other hand, that between *subscribing* and *not subscribing* a linguistic expression (*ibid* 600ff). The latter is owed to R.M. Hare, but Muffato argues against Hare's seeming

Hearers will discern whether the statement is a detached or a committed one, Raz suggests, on the basis of the ‘intentions of the speakers as revealed by their utterances or by the contexts in which they are made.’⁸⁴

To be clear, the difference between ‘detached’ and ‘committed’ statements does not hinge on whether the speaker himself actually believes in or accepts the ‘point of view’ adopted, but rather on whether such an acceptance is expressed or implied in the utterance of the statement. ‘Committed’ statements express or imply the speaker’s acceptance of the ‘point of view’ adopted, and ‘detached’ statements do not — whether or not, in either case, the speaker in fact accepts the point of view. This particular point may be obscured by the formulations in the examples. What makes the non-vegetarian’s statement a ‘detached’ one is not the fact that he himself does not accept that the requirements of vegetarianism are justified. What makes his statement a ‘detached’ one is that it does not express such an acceptance — a feature which is in this case contextually clear, as it is common knowledge among participants that the speaker is not a vegetarian. Conversely, it would not be the case that any similar token statement uttered by a ‘fellow vegetarian’ would necessarily be a ‘committed’ one: the relevant aspect of ‘committed’ statements is not whether the speaker accepts the point of view, but whether such an acceptance or belief is conveyed in the statement, whether or not the speaker in fact holds it.

Now, *legal* statements, too, says Raz, can be made from a ‘point of view.’ Namely, they can be made by a speaker who merely adopts, without endorsing or accepting, what Raz indistinctly calls ‘the point of view of the legal man,’⁸⁵ the ‘legal point of view,’ or the point of view of the ‘ideal law-abiding citizen.’⁸⁶ This point of view is variously described in different texts as the point of view of ...

... [an individual] who accept[s] all and only the laws of [his] country as valid.⁸⁷

... the man who [...] not merely conform[s] to law [but] follows legal norms and legally recognized norms as norms and accepts them also as exclusionary reasons for disregarding those conflicting reasons which they exclude.⁸⁸

... a person who believes in the binding force of [his country’s] rules of recognition [...] and who further] believes that no duty is binding, no right is valid, no normative consequence has any claim on those subject to it unless it can be traced back to the ultimate rules of [his country’s] law [...] and further] has complete knowledge of all factual information, is completely and unwaveringly rational, and has worked

conflation of subscription with use, and non-subscription with mention (*ibid* 603). The distinctions are cross-cutting; Razian *detachment*, Muffato submits, is a case of non-elliptic use (in direct speech), without subscription, of deontic sentences; but this amounts, in his view, to an impossibility: cf. *ibid* 618ff, 623, and likewise his *Norme e Discorsi su Norme* (Aracne 2010) 17-98, esp. 85ff, and 94ff. This seems to me to mark a departure from some comments on detached statements made by him in ‘Asserti Interni: Prescrizioni o Asserzioni?’ (2007) *Analisi e Diritto*, e.g. at 20 and 24. Cf. also Bruno Celano’s remarks in *Dialettica della Giustificazione Pratica. Saggio Sulla Legge di Hume* (Giappichelli 1994) 93-94, and 180, endnote 42.

⁸⁴ ‘Postscript’, *The Concept of a Legal System* (above n. 2) 238.

⁸⁵ ‘Kelsen’s Theory of the Basic Norm’ (above n. 8) 142.

⁸⁶ *Ibid* 140ff, and *Practical Reason and Norms* (above n. 1) 171.

⁸⁷ ‘Kelsen’s Theory of the Basic Norm’ (above n. 8) 140.

⁸⁸ *Practical Reason and Norms* (above n. 1) 171.

out all the consequences of the ultimate rules of [his country's] law including all those which follow from them when applied to facts as they are.⁸⁹

... a man whose moral beliefs are identical with the law. He does not add nor detract one iota from it. Furthermore [...] his moral beliefs all derive from his belief in the moral authority of the ultimate law-making processes. For him, in other words, his belief in the validity of all and only the legal norms is not a haphazard result of chance but a logical consequence of one of his beliefs.⁹⁰

The legal point of view is, in short, the point of view of someone who accepts that the law is valid — in the special sense of ‘validity’ which means that the law is justified and ‘ought to be followed’.⁹¹ Take one of Raz’s legal examples: ‘A ought to pay £80 income tax.’ Sentences like this, says Raz, may be used ‘to state what reasons for action people have.’ This is the ‘committed’ use. But they may also be used ‘not to state what action A has reason to perform, but simply to state what his legal situation is’, ‘to state what one has reason to do from the legal point of view’⁹² — by a speaker assuming ‘the point of view of the legal man without being committed to it.’⁹³ So ‘typical legal statements can be either committed or detached’: the former, but not the latter, ‘entail the legitimacy of the law.’⁹⁴ And, again, a detached legal statement is not to be confused with a conditional statement of ‘what the law is if it is valid’, i.e. *if* it ‘ought to be followed’. A detached legal statement is rather a statement ‘*that* [the law] is valid,’ i.e., that it ‘ought to be followed’.⁹⁵

And detached legal statements, according to Raz, are extremely common; indeed, they are ‘prevalent in legal discourse about our own or any other legal system.’⁹⁶ They are ‘typical of legal science,’ which ‘describes the law in normative statements’ ‘from a point of view which is not necessarily accepted by the speaker’ and thus ‘assumes the point of view of the legal man without being committed to it.’⁹⁷ Likewise, ‘when giving legal advice a solicitor or any other person is stating what is the case from the legal point of view.’⁹⁸ A ‘law lecturer or a legal writer normally does the same,’ and ‘a barrister arguing a case before a court may do no more.’⁹⁹ Even educated fleas, it would seem, do it.

⁸⁹ ‘Postscript’, *The Concept of a Legal System* (above n. 2) 237.

⁹⁰ ‘The Purity of the Pure Theory’ (above n. 8) 303-04.

⁹¹ *Practical Reason and Norms* (above n. 1) 127-28. Cf. also Robert Alexy’s outline in ‘Hans Kelsen’s Begriff des relativen Apriori,’ in Robert Alexy, Lukas H. Meyer, Stanley L. Paulson, and Gerhard Sprenger (eds) *Neukantianismus und Rechtsphilosophie* (Nomos 2002) 198-99, footnote 96; and, for a discussion of the compatibility of Raz’s legal point of view with the possibility of conflicting norms, Stanley L. Paulson, ‘Kelsen without Kant,’ in Werner Krawietz and Georg Henrik von Wright (ed), *Festschrift für Ernesto Garzón Valdés zum 65. Geburtstag* (Duncker & Humblot 1992), esp. at 160-62.

⁹² *Practical Reason and Norms* (above n. 1) 172, 175.

⁹³ ‘The Purity of the Pure Theory’ (above n. 8) 305.

⁹⁴ ‘On the Nature of Law’ (above n. 8) 113.

⁹⁵ Cf. ‘The Purity of the Pure Theory’ (above n. 8) 304-05, my emphasis; and also *Practical Reason and Norms* (above n. 1) 128, 175. ‘Conditional’ is sometimes contrasted by Raz with ‘categorical’ — cf. ‘The Purity of the Pure Theory’ (above n. 8) 304, and also ‘Postscript’, *The Concept of a Legal System* (above n. 2) 236-37, footnote 30 — but this is surely not meant to rule out the possibility that a detached legal statement be conditional in content.

⁹⁶ ‘On the Nature of Law’ (above n. 8) 114.

⁹⁷ ‘The Purity of the Pure Theory’ (above n. 8) 305.

⁹⁸ *Practical Reason and Norms* (above n. 1) 176.

⁹⁹ *Ibid* 176-77; and cf. also ‘Legal Validity’ (above n. 8) 153, 155; and the ‘Postscript’ to *The Concept of a Legal System* (above n. 2) 236. The doctrine of detached legal statements seems to me to be adumbrated *avant la lettre* in

Hence if Raz is right our initial problem appears to have been solved. For a detached statement is neither an ‘external’ statement nor an ‘ordinary moral statement.’ Being a statement *of* law, ‘of what legal rights or duties people have,’ a detached statement is ‘not a statement *about* people’s beliefs, attitudes, actions, not even about their beliefs, attitudes, or actions about the law.’¹⁰⁰ It is, in other words, ‘normative’ in the relevant sense. But on the other hand detached statements are not ‘full-blooded’ normative statements, for, given that the utterance of a detached statement ‘does not commit the speaker to the normative view it expresses,’ detached statements do not ‘carry the full normative force of an ordinary normative statement.’¹⁰¹ If this explanation is successful, then (T2) and (T3) are compatible and, therefore, (T2) does not imply (T1); and positivists can adopt (T3).¹⁰²

So, it seems, we simply have to reject the ‘assumption’ that types (a) and (b) ‘are the only kind of normative statement possible’¹⁰³ — even if ‘there is no doubt that statements of both [these] types are often made’¹⁰⁴ — and welcome detached legal statements in our typology as a ‘further kind’ ‘not reducible to one or the other’ of those two ‘basic types’.¹⁰⁵ Problem solved.

‘On Lawful Governments’ (above n. 8) 304, where Raz observes that while ‘in many contexts making a legal statement pragmatically implies an acceptance of the legal system presupposed by the statement,’ and even if ‘[w]hen stating “One ought to pay one’s taxes punctually,”’ e.g., ‘the speaker will usually be taken to accept the legal system according to which these statements are alleged to be true,’ there are nevertheless contexts in which ‘the presumption does not apply’ — such as ‘when one is discussing foreign law’ or ‘when the speaker is a lawyer pursuing its profession.’

¹⁰⁰ ‘Legal Validity’ (above n. 8) 153, my emphasis.

¹⁰¹ *Ibid.* In *Norm and Nature. The Movements of Legal Thought* (Clarendon Press 1992) 139, Roger Shiner reads this reference to the ‘force’ of ‘statements’ as an ‘evocation’ of J.L. Austin’s account of illocutionary force: he finds the ‘theoretical grounding’ of the concept of a detached statement to lie ‘in the philosophy of language’ (*ibid* 64), and that ‘the terms “detached legal statement” and “ordinary legal statement” refer to illocutionary acts distinguished by their force’ (*ibid* 144). But Shiner believes that Raz ‘has not absorbed the lessons Austin was aiming to teach’ (*ibid* 139); cf. also his discussion at 137-145 and 158-59. There is a reply by Keith C. Culver, ‘Shiner on “Detached Legal Statements”: A Defense of Raz’ (1995) VIII *Canadian Journal of Law and Jurisprudence*, 347-355.

¹⁰² Raz says that positivists ‘can and should’ adopt (T3), which ‘is not essentially a natural lawyer’s thesis,’ for ‘only through it and the doctrine of statements from a point of view can we understand the possibility of detached statements which are all the same normative and not merely statements about other people’s actions or beliefs etc’: cf. ‘Legal Validity’ (above n. 8) 159 (my emphasis). But the argument I have reconstituted would, if right, show only that (T2) is compatible with a defence of either of the two ‘semantic theses,’ (T1) or (T3). It would show, in other words, that the arguments for endorsing either thesis are independent of the arguments for endorsing or rejecting positivism. But it wouldn’t show that positivism ‘should’ adopt (T3) — this claim *presupposes* that (T3) is sound.

¹⁰³ *Practical Reason and Norms* (above n. 1) 172.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 172, 175, 177. Detached statements are nonetheless said by Raz to be ‘logically’ secondary or ‘parasitic’ on (if irreducible to) committed statements, which are called ‘primary’: see *Practical Reason and Norms* (above n. 1) 172, 211; ‘Legal Validity’ (above n. 8) 159; ‘Legal Rights’ (above n. 8) 254; or ‘On the Nature of Law’ (above n. 8) 112. Having in ‘Hart’s Expressivism and his Benthamite Project’ offered a reconstruction of Hart’s ‘analysis’ of committed, internal legal statements in *The Concept of Law* as an oblique, ‘hybrid’ expressivist ‘analysis,’ Kevin Toh suggests that Hart ‘had sufficient resources to account for detached legal statements’ — by ‘extending’ to detached statements his ‘expressivist’ analysis of committed ones. This would have enabled Hart to specify ‘the precise way in which the meaning of detached legal statements is parasitic on the meaning of committed ones’: cf. Toh’s ‘Raz on Detachment, Acceptance, and Describability’ (above n. 60) 413; and his ‘Hart’s Expressivism and his Benthamite Project’ (2005) 11 *Legal Theory*, at 89. Given that Toh proposes a ‘simulation explanation’ of detached statements, according to which a speaker who utters a detached statement ‘does not display his commitment to the relevant

3. WHY THE SOLUTION DOES NOT WORK

A

Or is it? As I said in the introduction, I do not think this solution can be made to work. Let me formulate my objection.

There are two features of detached statements which, although Raz never spells them out as such, are necessarily to be assumed if the notion is to be of any use.

First, detached statements are meant to be informative. More precisely, by uttering a detached statement, a speaker must be able to convey some information which was previously unavailable to the hearer. This is made very clear from both the vegetarian and the Orthodox Jew example.¹⁰⁶ The non-vegetarian, Raz writes, is ‘*informing* [his friend] what ought to be done from the point of view of a vegetarian’; likewise the reason the Orthodox Jew ‘asks the advice of his friend who is Catholic but an expert in Rabbinical law’ is *precisely* because he seeks some information: he is, says Raz, ‘relatively ill-informed.’

The second feature concerns a kind of relation which must necessarily obtain between the content of the point of view adopted in the making of a detached statement — that is, the content of the assumption on which the statement is made — and the content of the statement itself. For the idea of a statement made from a point of view appears to imply that the evaluation of whether the statement is true or false is itself relative to the point of view adopted: it appears to imply that it may be the case that from point of view *x* a token statement may be assessed as true, while from point of view *y* it might turn out to be false.

Now, Raz says, as we saw, that statements made from a point of view are like ‘statements made on the assumption that something is the case.’¹⁰⁷ And when a statement is made on a given ‘assumption’, the content of the assumption is taken as true (even though it may be false, and even though the speaker may know perfectly well that it is false). This has the following pragmatic consequence: the *point* of uttering a statement on the assumption that *A* must be that what is being stated is to be assessed relative to the assumption — that a statement which might otherwise be false may, on the assumption that *A*, be assessed as true. It would be pragmatically pointless to make a statement on the assumption that *A* when whether or not *A* is the case is absolutely irrelevant for the truth of the statement made; it would be pointless, for example, to utter ‘Today is Wednesday’ on the assumption that a daily glass of red wine is good for your health. But it would also be

laws but merely pretends or simulates such commitment’ (cf. *ibid*; and ‘Raz on Detachment, Acceptance, and Describability’ 411-13), such an ‘extension’ of Hart’s (reconstructed) ‘expressivist’ analysis of internal (committed) statements would yield, Toh suggests, a similarly ‘expressivist’ analysis of detached statements ‘as expressions of pretended or simulated acceptances of norms’ according to which a speaker who makes a detached statement ‘expresses a *psychological state that simulates* an acceptance of some norm’: cf. *ibid* 414; ‘Hart’s Expressivism’ 89; and also his ‘An Argument Against the Social Thesis’ (2008) 27 *Law and Philosophy*, 459. Given, however, that the sense in which Toh uses the term ‘expressivism’ entails a commitment to ‘noncognitivism’ (cf. ‘Hart’s Expressivism’ 79), it is not clear that this extended analysis would still qualify as ‘expressivist.’ Are *pretended* or *simulated* acceptances necessarily conative mental states — are they indeed mental states or attitudes at all in the relevant sense?

¹⁰⁶ Cf. also ‘Postscript’, *The Concept of a Legal System* (above n. 2) 237, footnote 30, where Raz entertains a certain interpretation of detached statements, only to dismiss it for being ‘empty and uninformative’; and the text to n. 73 above.

¹⁰⁷ *Practical Reason and Norms* (above n. 1) 175.

pointless to make a statement on the assumption that *A* when *A* itself exhausts the content of the statement made: for example, to utter ‘Today is Wednesday’ on the assumption that today is Wednesday. (This would moreover be redundant — and thus also uninformative, in violation of the first requisite I mentioned.) So in order for a statement made under an assumption *not* to be, in this sense, pointless, the content of the assumption must be part, but only part, of what makes the statement true. It must thus be the case that in order sincerely to utter the statement the speaker has to adopt the relevant point of view.¹⁰⁸ And this, too, seems to be presumed by Raz. His claim appears to be that the utterance of a non-committed normative statement requires the speaker to adopt the relevant point of view.

With this in mind, let us return to Raz’s hypotheticals. Take, to begin with, the Orthodox Jew example. Here, we may note, the hearer himself *is* an Orthodox Jew. Let me stipulate that an Orthodox Jew is someone who accepts that the laws of the Torah are justified and ought to be followed. (In this definition, of course, the phrase ‘the laws of the Torah’ is to be understood intensionally, not extensionally: one may be an Orthodox Jew and have incomplete or imperfect knowledge of the laws of the Torah — which seems indeed to be the case in Raz’s example.) Given this, the Catholic friend’s statement, if meant to be informative, needs to impart some information which the hearer would not already and necessarily possess simply in virtue of *being* an Orthodox Jew. Consider, for example, the following statement:

(3) You ought to behave as the Torah requires.

This is a statement which the Catholic cannot sincerely put forward as a committed statement. In order to utter it, he *has* to adopt the Orthodox Jewish point of view. But this statement would be completely uninformative for his Orthodox Jewish interlocutor. It would, moreover, seem to amount to a redundancy of sorts: it could be rendered as

(3R) Speaking from the point of view of someone who believes that you ought to behave as the Torah requires, you ought to behave as the Torah requires.

This is therefore clearly not the information required by the hearer in the example. The hearer already knows, or believes, or accepts, that he ought to behave as the Torah requires (and he also knows that his Catholic friend does not). The Orthodox Jew’s question is rather about the *content* of the Torah. It is a question about whether the Torah, for example, requires him to perform some particular kind of action on some particular occasion. What he seems to expect as an answer to his query is a statement with the form

(4) The Torah requires you to ϕ .

Patently, possession of a piece of information of *this* sort does not simply follow from the fact that one is an Orthodox Jew. But in that case, and precisely because of that, it appears, the Catholic friend does not need to adopt the Orthodox Jewish point of view in order to state it.

¹⁰⁸ This ‘assumption’ thus appears to work along the lines of a pragmatic presupposition.

The very same happens in the vegetarian example. What is the informative content of the speaker's statement? The example is somewhat ambiguous in this respect; it would perhaps at first sight appear as if what the vegetarian does not know — that which the non-vegetarian friend tells him — is that the dish contains meat. This, however, cannot be what Raz means. For that *the dish contains meat* is a straightforward statement of fact which under no account could be characterized as a 'normative' statement, detached or otherwise. The alternative answer is that the friend, in spite of being a vegetarian, does not know that the laws of vegetarianism demand that one not eat meat. This reading, even if it renders the example implausible, is necessary if the story is to serve as an illustration of the same point as the Orthodox Jew example.¹⁰⁹ But then, once again, the statement can be informative only if knowledge of its content does not simply follow from the very fact that one is a vegetarian — or the hearer would already and necessarily possess such information himself. It cannot be the statement that 'You ought to follow the laws of vegetarianism.' So the statement must be that vegetarian laws require one not to eat meat. This may be informative, of course. But in order sincerely to make such a statement one need not adopt any particular point of view at all.

It thus seems — and this is the short formulation of my objection — that detached normative statements are either pointless or uninformative.

B

Some counter-objections could perhaps be set forth. It is true, it might be said, that in order for the Catholic friend's statement to impart some information to the hearer it needs to be a statement of the *content* of the Torah — a statement that some action ϕ is required of him. But when uttering such a statement, the counter-objection would run, the speaker does not just say *that*. He is rather telling his friend that he ought to ϕ in virtue of the fact that the Torah requires that of him. And this the Catholic can only sincerely say if he adopts the Orthodox Jew point of view. The same, *mutatis mutandis*, would occur in the vegetarian example.

This counter-objection would be mistaken. Consider the following. Once in possession of the relevant information — the information conveyed by (4) — the Orthodox Jew will then know, or believe, that he ought to ϕ . He cannot form this belief just in virtue of the fact that he accepts as binding the precepts of the Torah (i.e., just in virtue of the fact that he is an Orthodox Jew). He needs moreover to know that the Torah does require him to ϕ . But, by the same token, knowledge of *this* fact — the fact that the Torah requires him to ϕ , a fact which he does not know just in virtue of being an Orthodox Jew — is also by itself insufficient for him to form the belief that he ought to ϕ . It is only because he already accepts, in virtue of being an Orthodox Jew, that he ought to do as the Torah requires, that the information imparted by (4) is sufficient for him to form the belief that he ought to ϕ . Now, the counter-objection we are considering would have it that the Catholic friend's statement does not simply amount to saying that (4), but rather to saying that

- (5) You ought to ϕ because the Torah requires you to ϕ .

¹⁰⁹ The example is therefore enormously improved by Frederick Schauer's preference for desserts made with gelatine: cf. 'Fuller's Internal Point of View' (1994) 13 *Law and Philosophy* 287.

This, to be sure, does not follow from (3). And it does require from the Catholic the adoption of the Orthodox Jew's point of view. The point of my objection, however, is that (4) may be uttered independently of (5), and that (4) is sufficient for the Orthodox Jew friend to form the belief that he ought to ϕ . So, for the hearer, the informative content of (5) is no different from that of (4). And even if (5) can only be sincerely uttered under the assumption that one ought to do as the Torah requires, and thus even if (5) is a statement which the Catholic can only make if he adopts the relevant point of view, the question is: why would anyone adopt such a point of view in order to answer a query which is only about the content of the Torah, and for whose reply a statement like (4) is perfectly sufficient? To utter (5) in these circumstances would be just as pointless as, for example, the statement that

(6) The Torah requires you to ϕ , but you ought not to do it,

which could be uttered from the speaker's own Catholic point of view; and also just as pointless as, for that matter,

(7) The Torah requires you to ϕ , and my favourite novel is *Anna Karenina*.

Statements (5), (6) and (7) would all be *equally* informative in respect to what the Orthodox Jew wants to know. For they all encapsulate the information which (4) already imparts, and (4) is all the speaker was asking for and wishes to know. But in so far as their content expands beyond that, (5) (6) and (7) are pragmatically pointless. They might accordingly elicit from the hearer variously puzzled reactions. To (7) the hearer could properly ask, referring to the second sentence, 'Why are you telling me that?' To (6), 'I already know that you yourself do not accept the Torah as binding; that was not what I asked.' And to (5), 'Thanks for the information; but why are you speaking as an Orthodox Jew would speak, when we both know that you are a Catholic?'

C

My counter-objector might now try a different route. She might reply that my argument seems to hinge on the fact that in both the vegetarian and the Orthodox Jew examples the hearer already occupies, or embodies, as it were, the 'point of view' concerned, and that *that* is why statements made from that point of view are uninformative: no hearer needs to be told how things look from *her* point of view. But surely this is a contingent feature of the example. And at least in the *legal* case — the objection would go — my argument would certainly not apply. Why not? For one, and given some, if not all, of the ways in which Raz defines the 'legal man,' it is not even clear whether *any* person can actually instantiate the legal point of view. At one point, Raz states that the 'legal man' is 'clearly too diabolical to contemplate in any way except as an abstract logical model.'¹¹⁰ But even if we accept the possibility of 'legal men' — Raz states elsewhere that 'there are always people who accept the [legal] point of view'¹¹¹ — it *may* surely be the case that many or most of the people

¹¹⁰ 'Postscript', *The Concept of a Legal System* (above n. 2) 237.

¹¹¹ *Practical Reason and Norms* (above n. 1) 177.

who seek information about what ought to be done according to the law do not themselves accept the legal point of view.

Let us consider this objection by addressing the underlying question: is there a difference in the kind of information required by someone who accepts the legal point of view and by someone who does not? Those who personally accept the legal point of view have, says Raz, a particular 'practical interest' in the information characteristically conveyed by legal statements. They 'want to know what ought to be done according to [the law] in order to know what they ought to do.'¹¹² For these hearers, therefore, my argument so far would seem to hold. The information needed by such a person would *not* be the legal counterpart of (3),

(3L) You ought to behave as the law requires,

nor the legal counterpart of (5),

(5L) You ought to ϕ because the law requires you to ϕ ,

but rather the legal counterpart of (4),

(4L) The law requires you to ϕ ,

which, my argument so far claims, is not a 'detached' statement; it would be pointless to adopt any particular 'point of view' in order to utter it.

But what about hearers who do not themselves accept the legal point of view? What about those persons, that is, who do not accept that the law is justified and ought to be followed? They, too, as Raz acknowledges, may have an 'interest' in knowing 'what is required by law,' and their interest may be just as 'practical' as that of the legal man.¹¹³ For example, Raz says, '[i]n the case of [practised norms] enforced by norm-applying organs' there may be 'many who have a derivative practical interest in what ought to be done according to such systems or norms,' because 'the fact that other people follow such norms and that institutions enforce them may itself become a reason for people who do not believe in the validity of the norms or systems concerned.'¹¹⁴ But simpler examples can be given as well. Raz even acknowledges that one may wish to know 'what is required by law' to satisfy a purely theoretical interest: his law lecturer's 'audience' may 'be interested in the information' simply 'in order to pass an examination or for any one of a variety of reasons.'¹¹⁵ But it then becomes clear that the information sought in these cases is precisely the same as in cases in which someone believes the law is justified. It is the information for whose communication (4L) is perfectly sufficient.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 176.

D

One last (to my mind) objection could be made to my argument. It might be claimed that *even* in order for someone to utter a statement like (4L) the adoption of the relevant point of view is actually necessary, and therefore not pragmatically pointless.

Once again, it is not clear that Raz would be willing to endorse this claim. After all, the very problem the solution of which demanded the introduction of the notion of a detached statement was a problem posed by the use of ‘normative language’ in describing the law. And (4L) is formulated in what Raz himself offers, in the passage reproduced in the beginning of this paper, as an example of *non-normative* language.¹¹⁶ (4L) is formulated in the language of what the law *requires* — and not in the ‘normative’ language of ‘duties, obligations, rights and wrongs, etc.’¹¹⁷ Moreover, statements formulated in this ‘non-normative’ language of what the law ‘requires’, ‘commands’, or ‘orders’ people to do seem just the kind of statements which the early, ‘reductivist’ positivists such as Bentham and Austin would have been content to take as basic or fundamental. Were they not the ones who claimed (wrongly, according to Raz, as we also saw) that legal statements ‘are synonymous with statements about what certain people commanded or willed, or about the chances that a man may come to harm of a certain kind’?¹¹⁸ But maybe this is a misreading of what ‘reductivism’ amounts to. For in a different passage Raz characterizes as Bentham’s ‘reductivist’ stance on legal statements in the following manner:

The Benthamite answer was to deny that they are normative utterances: ‘*X* has a duty to ϕ ’ means ‘*X* is liable to a sanction if he does not ϕ .’ ‘A law requires that *X* ϕ ’s’ means ‘a sovereign commanded *X* to ϕ .’¹¹⁹

In this passage a statement like (4L) — a statement in which the language of legal *requirements* is employed — is now given as an illustration of a *normative* statement of law in the relevant sense, and not as a straightforward statement of a social fact. It must therefore be the case, according to Raz, that it is either ‘committed’ or ‘detached’ — and that the adoption of the relevant point of view is therefore needed in order to utter it.

The underlying point of this objection, then, appears to concern the very the notion of a requirement, legal or otherwise. The notion of a requirement, this objection seems to assume, is itself a normative notion. How so? Well, whoever requires you to ϕ , the objector might hold, necessarily claims that you have reason to ϕ . In virtue of the very notion of a requirement, if the law requires you to ϕ , then the law claims that you have reason to ϕ . And so a statement like (4L) — a statement that the law requires you to ϕ — is just as ‘normative’ as any of the following:

- (8) According to the law, you ought to ϕ ;
- (9) According to the law, you have an obligation to ϕ ;
- (10) According to the law, you have a duty to ϕ .

¹¹⁶ Cf. text to n. 5 above.

¹¹⁷ Cf. ‘Preface to the First Edition’, *The Authority of Law* (above n. 3) xi.

¹¹⁸ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 53.

¹¹⁹ ‘Legal Validity’ (above n. 8) 154.

Here is how John Gardner recently put it:

[A] legal obligation or right is none other than an obligation or right that exists according to law. And an obligation or right that exists according to law is none other than an obligation or right, the existence of which law claims.¹²⁰

The underlying point, to repeat, seems to be that whenever the law requires you to ϕ — or, perhaps more precisely, that *in* requiring you to ϕ — the law thereby claims that you have reason to ϕ . Your legal duty to ϕ is, in this reading, a duty which the law claims that you have. The content of this claim may of course be true or false (you may or may not actually have such a duty) but it is necessarily made if and whenever the law requires you to ϕ . Or, in a different terminology, the objection would be that the illocutionary point of directive speech acts — requirements, commands, orders, and so on — necessarily involves, on the part of the speaker, a claim that the hearer has reason to act as the speaker tells him to.¹²¹

Let us grant *arguendo* this underlying point about the notion of a requirement. The formulations in (8) and (9) remain at any rate incomplete. We cannot simply say, as Gardner does, that a legal duty is ‘a duty the existence of which the law claims.’ (4L) is not equivalent to, say, (9). For it is possible for the law — or for a speaker, more generally — to claim, truly or falsely, that you have an obligation to ϕ without requiring you to ϕ . I take Gardner to mean instead that, in virtue of the concept of a legal requirement, (4L) *entails* (9). That this may be so, however, is immaterial for the point under scrutiny, and lends no weight to the claim that any utterance of (4L) is necessarily either ‘committed’ or ‘detached.’ For even if a requirement (or, more generally, a directive speech act) does involve such a claim on the part of the speaker, to make a statement that the law requires you to ϕ — to make a statement of the form (4L) — is nonetheless and merely to report a social fact. In order to utter a statement like (4L) one does not need to accept that the requirement concerned is justified and ought to be complied with, nor does one need to feign such acceptance. No specific ‘point of view’ is therefore involved in uttering (4L) — just as, more generally, no specific ‘point of view’ is involved in the utterance of reports *oratione obliqua* of speech acts performed.

The phrase ‘according to the law,’¹²² in (9) as in (8) or (10), in fact, is no allusion to the ‘point of view’ of anyone who accepts as binding the requirements of the law. It rather refers, as it were, to the ‘point of view’ of the *law itself*. Neither (9) nor (4L) are statements of a reason for ϕ -ing, albeit made from a ‘point of view’. Rather, (9) is, and (4L) implies, a

¹²⁰ ‘How Law Claims, What Law Claims,’ in Matthias Klatt (ed), *Institutional Reason. The Jurisprudence of Robert Alexy* (OUP, forthcoming).

¹²¹ It is worth observing, I think, that under this reading Bentham’s and Austin’s supposed ‘reductivist’ mistake would not be that they sought to reduce ‘normative’ statements to statements of social facts — but rather, perhaps, that they endeavoured to characterize the notion of a *requirement* (a ‘command’, in their preferred terminology) just in terms of the will of a *de facto* superior; and thus that, by failing to account for the normative claim inherent (again, under this reading) in the very notion of a command they were unable properly to distinguish the making of a command from a demand made by a speaker over those who happen to be subject to the speaker’s purely coercive dominion. And it may be that the charge of mistake is grounded on a previous stipulation that Bentham’s and Austin’s notion of command was stripped of any element of *authority*. Such a stipulation was of course made by Hart, and expressly so: cf. *The Concept of Law* (above n. 49) 19–20, 51.

¹²² As well as other related operators: ‘Legally...’, ‘It is the law that...’, etc. Cf. *Practical Reason and Norms* (above n. 1) 172–73; ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 63ff.

statement that *the law claims that* there is a reason for ϕ -ing. So even if the notion of a legal requirement may be an intrinsically ‘normative’ notion, the statement that the law requires some action of someone is not a normative statement in the sense relevant for our discussion. It does not tell the hearer that there is a reason to ϕ . It is not a statement of a reason for action.

Of course, if a statement like (4L) is true, it will then become true that

(11) If you have reason to do as the law requires, you have reason to ϕ .

But (11) is also not a ‘detached’ statement. It is a statement conditional on the existence of a reason to obey the law, rather than a statement that such a reason exists. It is clearly not equivalent to (4L). And only (4L) is, strictly speaking, a statement *of* law. To be sure, the utterance of (11) may, given the appropriate context, informally suggest the corresponding (4L) statement — i.e. (11) may be used to transmit the information in (4L). But this is simply because in such contexts (11) will function as a compressed or enthymematical formula in which (4L) is simply assumed. The same assumption would be made, e.g., in

(12) If you have no reason to do as the law requires, you have no reason to ϕ ,

or in

(13) If you have reason not to do as the law requires, you have reason not to ϕ .

My point is, however, that (4L) would in all cases suffice to convey the desired information as to the content of the law. It is not a ‘detached’ statement; it would be pointless in order to utter it to adopt any particular ‘point of view’.

E

The notion of a detached legal statement has enjoyed a noteworthy success. Hart, for one, took it on as a ‘third kind,’ remarking that the detached point of view ‘might well be called “hermeneutic”.’¹²³ Every so often referred to as a *discovery* of Raz’s, rather more than as a

¹²³ Cf. the ‘Introduction’ to his *Essays in Jurisprudence and Philosophy* (above n. 72) 14, and also the discussion in ‘Legal Duty and Obligation’ (above n. 60) at 153 ff. In the second edition of *H.L.A. Hart* (above n. 49) at 204, Neil MacCormick comments on this passage, finding it ‘fully compatible’ with his own earlier distinction of an ‘internal,’ a ‘hermeneutic’ (or ‘non-extreme external’) and an ‘extreme external’ point of view — an account first introduced, under different labels, in the ‘Appendix’ to *Legal Reasoning and Legal Theory* (above n. 49). MacCormick differentiates a ‘cognitive’ and a ‘volitional’ component in the ‘internal’ point of view, maintaining that ‘for an understanding of norms and the normative’ it is sufficient that one has ‘full sharing of the former’, and ‘full appreciation of, but not necessarily sharing in’, the latter; and this is the hallmark of what he originally dubbed the ‘cognitively internal’, and later renamed ‘non-extreme external’, or ‘hermeneutic’, point of view: cf. *ibid* 292; *H.L.A. Hart* (1st edn, Edward Arnold 1981) 33ff; and the second edition (above n. 49) at 47ff. Similarities to Raz’s detached point of view have often been noted. So have the differences; in a passage already quoted in part — cf. *Norm and Nature* (above n. 101) 64 — Roger Shiner observes that MacCormick’s notion is ‘grounded in the philosophy of mind,’ Raz’s ‘in the philosophy of language.’ MacCormick discussed Raz’s notion at some length in his ‘Comment,’ in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy. The Influence of H.L.A. Hart* (Clarendon Press 1987) 108ff; and eventually took it up himself in the second edition of *H.L.A. Hart* (above n. 49) at 221, endnote 23. But he did remark that he found it preferable to speak of ‘detached’ *judgments*, for to use ‘the

theoretical construct,¹²⁴ detached statements have been incorporated as a stepping stone in related discussions, and the possibility thereof has by and large been taken as a given in contemporary jurisprudence.¹²⁵ I am however brought to the conclusion that the idea of a detached statement, favoured as it may be, cannot be made to work. And the problem of providing an ‘anti-reductivist explanation of legal statements based on the sources thesis’¹²⁶ is thus *not* thereby solved.

4. WHY THE PROBLEM IS FALSE

But the problem itself is, I think, a false problem, and the discussion in the previous section will help me illustrate why this is so.

Take P1 as an example of a legislated provision:

P1 Employers shall take all measures necessary to prevent accidents in the workplace.

I assume that legal statements are truth-apt, and that they can only be assessed as true or false when contrasted with a given set of legal ‘source-materials’ (to employ the usual phrase); any token statement of law may be true if contrasted with a given set of

term “detached statement” [...] is to confuse a linguistic entity with a mental act’: cf. *Institutions of Law. An Essay in Legal Theory* (OUP 2007) 104, footnote 8.

¹²⁴ John Finnis, e.g., credits Raz with having ‘identified’ detached statements, which he also finds ‘very common’ e.g. ‘in textbooks,’ ‘professional opinions, advice, and arguments’: cf. *Natural Law and Natural Rights* (above n. 83) 235 and, in general, 233-37, 239, and 365. Raz’s insistence on the non-conditional character of detached formulations is nevertheless overlooked in Finnis’ characterization: cf. the formulations of ‘S₃’ statements, e.g., in *ibid* 235 or 365.

¹²⁵ Cf., for just some examples, Gerald J. Postema, ‘The Normativity of Law’ in Ruth Gavison (ed) *Issues in Contemporary Legal Philosophy* (above n. 123) 83, as well as David Lyons’ ‘Comment’ in the same volume, at 122ff; Jeffrey D. Goldsworthy, ‘The Self-Destruction of Legal Positivism’ (1990) 10 *Oxford Journal of Legal Studies* 450, 453; Frederick Schauer, ‘Fuller’s Internal Point of View’ (above n. 109) 287-89; William N.R. Lucy, ‘Criticizing and Constructing Accounts of Legal Reasoning’ (1994) 14 *Oxford Journal of Legal Studies* 325-26; Stephen R. Perry, ‘The Varieties of Legal Positivism’ (1996) IX *Canadian Journal of Law and Jurisprudence* 371; Leslie Green, ‘Civil Disobedience and Academic Freedom’ (2003) 41 *Osgoode Hall Law Journal* 395, and ‘General Jurisprudence: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 567-68; Veronica Rodriguez-Blanco, ‘Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View’ (2007) XX *Canadian Journal of Law and Jurisprudence* 453ff (Rodriguez-Blanco casts detached statements as statements made from a ‘practical point of view’ — a ‘second- or third-person standpoint’ from which one may nevertheless have an ‘understanding of what one ought to do’ — which is distinct from the ‘participant’s point of view’, even if both are often confused under the label ‘internal’: cf. *ibid* 454, 460ff, 466ff., 470; ‘detached’ and ‘committed’ are rendered as ‘different perspectives’ of the ‘practical’ viewpoint; and Hart’s ‘internal’ point of view — though not Winch’s — is, Rodriguez-Blanco argues, the ‘practical’ one, ‘harmonious’ with Raz’s: *ibid* 469-470); Kevin Toh, ‘Hart’s Expressivism’ (above n. 105) 89, incl. footnote 24, and ‘Raz on Detachment’ (above n. 60) 407, 412, accepting that detached statements are made in legal as well as in ethical contexts, and finding ‘much plausibility’ in Raz’s hypotheticals — although a later passage in ‘An Argument Against the Social Thesis’ (above n. 105) 459-60 sounds more cautious in this respect; Toh often speaks as if, at least when it comes to a detached statement ‘made within the speaker’s own legal system,’ it takes a ‘disaffected or alienated’ member of a community, a speaker ‘whose normative commitments are deeply at odds with those embedded in the community’s legal system,’ to utter a detached legal statement: cf. e.g. ‘Raz on Detachment’ (above n. 60) 407ff.; or John Gardner, ‘Nearly Natural Law’ (2007) 52 *The American Journal of Jurisprudence* 6-7.

¹²⁶ ‘Legal Reasons, Sources, and Gaps’ (above n. 8) 54.

source-materials, and false if contrasted with another. I assume moreover that the set of source-materials with which a token statement of law is to be contrasted is the set of materials relative to which it is put forward by a speaker. To leave aside immaterial complications, then, take P1 to be the member of a set of legal source-materials including no other provision or element.

Suppose, now, that a token of S1 is put forward relative to {P1}:

- S1 The law requires employers to take all measures necessary to prevent accidents in the workplace.

Assuming our ordinary interpretative methods, S1 would non-problematically be deemed a true statement of law. It is clearly made true in virtue of the content of the materials alone, and indeed meant as nothing more than a statement *of* the content of the set of source-materials relatively to which it is put forward. It is certainly no statement of a reason for action. It is made from no particular point of view. It is, in short, not a normative statement in Raz's sense.

Consider, now, the following statements:

- S2 Employers have the legal duty to take all measures necessary to prevent accidents in the workplace;
- S3 Legally, employers ought to take all measures necessary to prevent accidents in the workplace.

Put forward relative to {P1}, tokens of either S2 or S3 are substitutable *salva veritate* for S1. Like S1, they are made true just in virtue of the content of P1. And, just like S1, they are not normative statements. But 'normative language' *is* employed in S2 and S3 — the language of 'duties' and 'oughts'. Which makes clear, I think, that Raz is mistaken in claiming that the mere fact that terms like these are used in the making of typical statements of law somehow converts the statement into a 'normative' statement (in Raz's sense of 'normative': a statement *that* there is a reason for ϕ -ing) whose compatibility with the 'sources thesis' we need somehow to explain.

Not only is the inference from the fact that 'normative language' is used in legal statements to the conclusion that legal statements are statements of reasons of action unwarranted — the conclusive proposition seems to me plainly to be false. Contrast S1 with any of the following statements, which, taken as a whole, might well be put forth as 'normative' statements proper:

- S1a The law **requires** employers to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **ought to** take all measures necessary to prevent accidents in the workplace;
- S1b The law **requires** employers to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have reason to** take all measures necessary to prevent accidents in the workplace;

S1c The law **requires** employers to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have the duty to** take all measures necessary to prevent accidents in the workplace.

These statements are clearly not redundant. If indeed they are capable of being true, they are not made true in virtue of P1 alone. But these complex statements all *include* S1, and therefore, given the substitutability *salva veritate* of S2 or S3 for S1, the following equivalences obtain:

S2a Employers **have the legal duty** to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **ought to** take all measures necessary to prevent accidents in the workplace;

S2b Employers **have the legal duty** to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have reason to** take all measures necessary to prevent accidents in the workplace;

S2c Employers **have the legal duty** to take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have the duty to** take all measures necessary to prevent accidents in the workplace;

S3a **Legally**, employers **ought to** take all measures necessary to prevent accidents in the workplace, and *therefore* employers **ought to** take all measures necessary to prevent accidents in the workplace;

S3b **Legally**, employers **ought to** take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have reason to** take all measures necessary to prevent accidents in the workplace;

S3c **Legally**, employers **ought to** take all measures necessary to prevent accidents in the workplace, and *therefore* employers **have the duty to** take all measures necessary to prevent accidents in the workplace.

Given that S1 is not redundant, these cannot be redundant. Which means that for example in S2c or S3a the terms ‘duty’ and ‘ought’ are not being used in the same sense on both their occurrences within the same statement. Likewise, just as none of the following would be self-contradictory,

S1d **The law requires** employers to take all measures necessary to prevent accidents in the workplace, *but* employers **ought not to** take all measures necessary to prevent accidents in the workplace;

S1e **The law requires** employers to take all measures necessary to prevent accidents in the workplace, *but* employers **have no reason to** take all measures necessary to prevent

accidents in the workplace;

S1f **The law requires** employers to take all measures necessary to prevent accidents in the workplace *but* employers **have no duty to** take all measures necessary to prevent accidents in the workplace,

there would be no self-contradiction in, for example,

S2f Employers **have the legal duty to** take all measures necessary to prevent accidents in the workplace, *but* employers **have no duty to** take all measures necessary to prevent accidents in the workplace; or

S3d **Legally**, employers **ought to** take all measures necessary to prevent accidents in the workplace, *but* employers **ought not to** take all measures necessary to prevent accidents in the workplace.

What this illustrates is simply that (T1) is true — or rather (for the phrase ‘in legal or moral contexts’ lends itself to more than one interpretation) that there is a use of the language of ‘rights’ and ‘duties’ in legal statements, which is moreover *the* characteristic and disseminate use in the legal context, in which those terms have quite a different sense from the one they have in the ‘moral context.’¹²⁷ And if (T1) is true, Raz’s ‘problem’ simply disappears. For the very formulation of the ‘problem’ relied on the assumption that (T3), and not (T1), was true. Such an assumption was grounded on the mere fact that ‘normative language’ is employed in legal statements simply in order to state the content of the law. This *is* a fact, of course. But from it, contrary to Raz’s claim,¹²⁸ (T3) cannot be inferred.¹²⁹

I should note, in conclusion, not only that endorsement of (T1) does not imply a commitment to legal positivism; but also that joint endorsement of (T1) and (T2), the ‘sources thesis’, does not commit anyone to any sort of ‘reductivist’ stance of ‘normativity’ to social facts. The equivalence or synonymy of S1, S2 and S3 statements simply attends to the fact that one of the typical uses of normative terminology is to state the content of a given set of legal materials. (S1, S2, and S3 are meant in any case only to exemplify, and not to exhaust, the realm of possible types of statements in which ‘normative’ terminology is employed in this non-normative sense). And this says nothing about the meaning of statements in which normative terminology is used to state whatever reasons for action

¹²⁷ One *may* of course use the terms in the ‘moral’ sense *while speaking of the law*, and thus ‘in the legal context,’ to state e.g. that one has a moral duty to do as the law requires: hence the proviso; but this poses no problem at all for the ‘sources thesis.’

¹²⁸ The claim is explicitly made: cf. *Practical Reason and Norms* (above n. 1) at 154, where Raz states that ‘the use of so many normative terms such as “rules”, “duties”, “obligations”, “rights” or “powers” to describe both laws and legal situations’ is ‘ample justification’ for taking legal rules as reasons for action, and hence statements of law as statements of reasons for action.

¹²⁹ Richard Holton, while leaning towards the acceptance of some version of Raz’s ‘committed’/‘detached’ distinction — which, he submits, might perhaps be more precisely conceived along fictionalist lines — nevertheless maintains not only that “‘legally obligatory’ and “‘morally obligatory’ mean different things,” but also (and quite rightly) that “‘obligatory’ has a different sense in each construction.” He therefore denies that the ‘detached’/‘committed’ distinction is applicable to *legal* systems. Cf. ‘Positivism and the Internal Point of View’ (1998) 17 *Law and Philosophy* 617-18.

there may be.

The fallacy involved in the inference, from the fact that ‘law and morals share a common vocabulary of rights and duties,’ to the proposition that those terms mean the same in both ‘contexts’ had already been pointed out by Hart,¹³⁰ and others have occasionally pressed the same point.¹³¹ The fallacy, however, has proved resilient.¹³² It manifestly underlies Raz’s assertion that ‘the problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situations.’¹³³ But this, I have contended, is wrong.

¹³⁰ Hart speaks of a ‘mistaken inference’: cf. *The Concept of Law* (above n. 49) 7; and while he believed that the fact that ‘law and morals share a common vocabulary’ is due to ‘no accident’ (*ibid* 8, 172), he insistently denied what he called ‘the identity of meaning of normative propositions in legal and moral contexts’: cf. ‘Legal Duty and Obligation’ (above n. 60) 153. His idea was that terms like ‘duty’ or ‘obligation’ are ‘legally coloured’: their moral occurrences are to be explained by reference to their central legal meanings, and not the other way round. On the topic, see ‘Legal and Moral Obligation’ (above n. 54) 83; *The Concept of Law* (above n. 49) 170ff, 203; ‘Problems of the Philosophy of Law,’ in his *Essays in Jurisprudence and Philosophy* (above n. 72) 91-92; and ‘Legal Duty and Obligation’ (above n. 60) 153, 160-61.

¹³¹ Cf. e.g. Juan Carlos Bayón, *La Normatividad del Derecho* (above n. 72) 29-30; or Roger Shiner, *Norm and Nature* (above n. 101) 143.

¹³² Cf. Timothy Endicott’s survey in ‘Law and Language,’ *Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), <http://plato.stanford.edu/archives/fall2010/entries/law-language>, at 23-9 of the pdf version.

¹³³ *Practical Reason and Norms* (above n. 1) 170.